Consultation Paper

Broadcasting and New Digital Media: Future of Content Regulation

JANUARY 2008

New Zealand Government

Te Kāwanatanga o Aotearoa

ISBN 978-0-478-18457-0

© Crown copyright

First published in January 2008 by:

Ministry for Culture and Heritage
PO Box 5364
Wellington
New Zealand

http://www.mch.govt.nz

Phone: +64-4 499 4229

Permission to Reproduce this Paper

The Ministry for Culture and Heritage, as the copyright owner, authorises reproduction of this work, in whole or in part, so long as no charge is made for the supply of copies, and the integrity and attribution of the work as a publication of the Ministry for Culture and Heritage are not interfered with in any way.

Disclaimer

The opinions contained in this document are those of the Ministry for Culture and Heritage and do not reflect official government policy.

Readers are advised to seek specific legal advice from a qualified professional person before undertaking any action in reliance on the contents of this publication.

While every effort has been made to ensure that the information set out in this document is accurate, the Crown does not accept any responsibility whether in contract, tort, equity or otherwise for any action taken, or reliance placed on, any part, or all, of the information in this document or for any error in or omission from, this document.

Posting and Release of Submissions

The Ministry for Culture and Heritage may publish all written responses on its website at http://www.mch.govt.nz. The Ministry will consider you to have consented to the publication of your response, unless clearly specified otherwise in your response.

Please clearly indicate in your written response if you do not wish your name to be published, including in any summary, in material the Ministry for Culture and Heritage may prepare for public release on responses received.

Please advise the Ministry of any objection to the release of any information contained in a written response to this document, and in particular, which parts should be withheld, together with the reasons for withholding them. The Ministry will take into account all such objections when responding to requests for information on written responses to this document under the Official Information Act 1982.

Foreword

"Like similar countries around the world, it is time to take stock and consider whether the present measures are adequate in the new era of converging technologies."

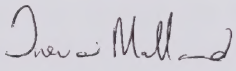
The rapid spread of audio-visual content of all kinds to new digital platforms locally and internationally raises questions for New Zealand's broadcasting standards regime. The development of on-line and mobile ways of delivering content, and New Zealanders' growing control over how, when and where they receive it have implications for how content is regulated.

Like similar countries around the world, it is time to take stock and consider whether the present measures are adequate in the new era of converging technologies. This paper is concerned with the spread and replication of broadcasting channels and broadcasting-like content on the new platforms. It asks questions about providing consistency of regulation across such content.

Content regulation is currently governed by parts of the Broadcasting Act 1989 which establishes the Broadcasting Standards Authority as a complaints body. Broadcasters are required to observe codes of broadcasting practice and viewers can complain about a perceived breach. This model applies to the conventional concept of scheduled programming and passive viewing – and not to a PC or mobile phone where viewers actively access material on demand.

This discussion paper and accompanying questionnaire is the first step in seeking public feedback. It does not propose any changes to the scope of the regime, nor does it present options for structural reform. Further public consultation will be carried out should any changes be proposed.

I invite you to respond to the questionnaire so that we can develop future options for New Zealand's content regulation in broadcasting and related media.



TREVOR MALLARD
MINISTER OF BROADCASTING

Contents

The Purpose of this Paper 2

How to Comment 3

Introduction 4

Challenges to the System: the Changing Nature of Broadcasting 7

Questions 11

What the Regulation of Content should be Concerned with 11

A Single Regime? 12

Broadcasting-like Material Provided from Outside New Zealand 15

The Role of a Regulator 17

A Regulatory Agency vs Self-Regulation 18

A Broader Role for an Agency? 19

Media Literacy and Education 22

Media Education and Violence 24

The Concepts Guiding Broadcast Standards 26

A Single Set of Concepts? 26

Particular Concepts 29

Other Ideas and Comments 33

Functions of the Broadcasting Standards Authority 34

The Purpose of this Paper

This paper seeks your views on the future of broadcasting standards in New Zealand. What we call "broadcasting" is in an exciting period of transition, with audio-visual content appearing in a variety of media, received and shared and added to on demand. Government is encouraging this development with its digital broadcasting and communications policies. But the broadcasting standards regime was set up in a different time, when "broadcasting" meant conventional television and radio. Some changes will be needed to our broadcasting standards arrangements. This paper gives you an opportunity to give your views about what those changes should be.

How to Comment

This Consultation Paper outlines the key issues and seeks comments regarding particular questions, to be returned to the Ministry. We welcome all views.

The deadline for responses is **Friday 4 April 2008**.

This paper is available online at www.mch.govt.nz/publications/

All questionnaires should be sent to:

The Broadcasting Content Regulation Paper
Broadcasting Unit
Ministry for Culture and Heritage
P O Box 5364
WELLINGTON
Ph (04) 499 4229

or emailed to:

broadcastingregulation@mch.govt.nz

We thank you for your consideration and input.

Introduction

Broadcast content is regulated in New Zealand under the Broadcasting Act 1989. This Act makes broadcasters responsible, in the first place, for maintaining broadcasting standards in all their programmes. These standards, as defined in Section 4(1) of the Act, are required to be consistent with:

(a) The observance of good taste and decency; and
(b) The maintenance of law and order; and
(c) The privacy of the individual; and
(d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
(e) Any approved code of broadcasting practice applying to the programmes.

The Act also makes broadcasters responsible for receiving complaints about their content, and requires them to maintain and publicise a complaints process. (Section 6 of the Act sets out broadcasters' obligations in detail.)

The public's ability to make complaints about broadcast content does not end with the broadcasters, however. The Act requires that "a body other than the broadcaster must be available to complainants to ensure that broadcasters discharge their responsibilities in relation to programme standards". That body is the Broadcasting Standards Authority (BSA), an independent Crown entity that plays a quasi-

judicial role. Viewers or listeners who are dissatisfied with the broadcaster's response to their complaint can refer it to the Authority for a decision. The BSA's functions are set out in Section 21 of the Broadcasting Act, attached at the back of this paper.

In addition to determining complaints, the BSA reviews and approves the codes of broadcasting practice that the broadcasters are required to use in developing their broadcast standards. The broadcasters themselves participate in the drafting of the codes. There are currently four codes: for free-to-air television, pay television, radio and election programmes. Complaints by the public, whether to broadcasters in the first instance or to the BSA if dissatisfied, are made with reference to these codes[1].

There is thus an element of self-enforcement in the New Zealand system. Within the statutory rules, broadcasters, public or private, select programmes and respond to complaints according to codes that they themselves have helped to devise. But Parliament, through the Broadcasting Act, has established the BSA as a remedy for viewers and listeners who believe their complaints have not been adequately addressed. If it finds a complaint to be justified, the BSA is able to require the broadcaster to broadcast a statement indicating that the complaint has been upheld and why (and may impose penalties in some cases).

The system for broadcast content regulation is distinct from the ratings system used for films and publications and the regulation of the press, advertising, mobile telephony and the internet. None of the following areas is covered by the Broadcasting Act:

- The *Office of Film and Literature Classification*, under the Films, Videos and Publications Classification Act 1993, classifies

[1] The Broadcasting Amendment Act (No. 2) 2007 enables complaints about election programmes to be made directly to the BSA.

"publications" (widely defined to include films, books, musical recordings and computer files) submitted to it, as unrestricted, restricted (generally to certain age groups) or objectionable according to standards set out in the Act. In addition to the providers of content, the Act provides for individual consumers who, for example, possess objectionable material or make restricted material available to underage persons, to be penalised. (The Telecommunications Act 2001 also provides the state with such a power in relation to individuals, via a section on "Misuse of Network".)

- The *Press Council* operates a self-regulatory set of principles that applies to the websites of newspapers and magazines as well as their paper content. Some of these principles include ideas that are comparable to those guiding the broadcasting regime (in particular in such areas as fairness and balance).

- *Mobile telephone* service providers (such as Vodafone or Telecom) operate a self-regulatory industry code of practice for the provision of streamed and downloaded audio-visual content via their networks. While this code provides for classifications, it does not include a set of standards, and complaints can only be made where complainants believe that content has been inappropriately classified.

- Advertising in all media was made self-regulatory in 1993, under the *Advertising Standards Authority*, an industry body. The codes the Authority uses cover some comparable areas of concern to those under the broadcasting regime, such as the protection of children.

- *Internet* service providers in New Zealand currently operate without a code of practice.

Challenges to the System: the Changing Nature of Broadcasting

Versions of the New Zealand approach to broadcast content regulation can be found in many countries. The basic principle of combining broadcaster responsibility with recourse to a complaints body has proved durable. But changes in the nature of what we call "broadcasting" are putting this model under pressure.

"Broadcasting", as the word suggests, has traditionally meant the transmission of content to an audience on a one-to-many basis: we watch or listen at scheduled times. Developments in digital technology, however, are allowing broadcasters – and others – to provide content to us individually at our demand. We choose when we watch or listen.

Content can be accessed on websites, or through podcasting, for example. The development of Internet Protocol Television will cause television and the internet to converge to an extent not seen before. The control we have always been able to exert through operating the on-off switch has grown to the point where we will increasingly be able to create our own schedules of content.

The spread of content of all kinds to new, digital platforms is a fast-developing trend in New Zealand and internationally. These newer platforms are being used – and contributed to – with particular enthusiasm by younger sections of the population but are increasingly important to most New Zealanders, whether at home, school or work. The share of listening and viewing time taken up by these newer platforms is likely to continue to increase, supplementing and to some degree replacing conventional scheduled broadcasting. Some of the content received on these platforms comes directly from overseas, beyond the scope of current regulation.

Government policy in telecommunications and digital broadcasting is supporting these trends, which may radically change the broadcasting and media landscape in New Zealand. Against this background, the regime for regulating broadcast content in New Zealand requires re-examination.

At present, New Zealand's regime of broadcast content regulation is based on the traditional concept of broadcasting. The definition of "broadcasting" used in the Broadcasting Act excludes the newer, on-demand forms of transmission. Internationally, the burgeoning capabilities of digital technology are forcing a review of the broadcasting standards regimes established by states. Countries are beginning to ask whether their standards regimes should be extended to cover the new ways of distributing content – or whether the distinction between broadcasting and other forms of communication is breaking down to the point where an altogether new approach is needed.

Some countries are persisting with a "broadcasting-centric" approach, focusing on broadcasting in the established sense. Others are placing their regulation of broadcasting and other media under the same regime: a uniform set of rules may not be applied across all platforms, but responsibility for content regulation of "old" and "new" platforms is placed within the same agency. A hybrid form of regulation is also emerging, which concentrates on "broadcasting-like" audio-visual content rather than the other kinds of content that appear on the internet or mobile phones (such as e-mails or texts). Again, the same level of regulation may not be applied to every kind of "broadcasting-like" content. Just as different codes apply in New Zealand to free-to-air and pay television, different sets of rules can be used for different platforms, depending on the amount of control the audience can exercise in receiving the content.

In 2006 the Broadcasting Standards Authority and the Ministry for Culture and Heritage jointly commissioned research on international developments in content regulation. The research report is available at www.bsa.govt.nz. New Zealand is facing the same sort of questions about the future of its content regulation in broadcasting as many other countries.

Your views are sought on what kind of standards regime New Zealand should have in the new broadcasting era.

- Do we want the same rules to apply to the new ways of receiving content as to traditional broadcasting, and the same ability to make a complaint?
- What difference does it make when the viewer or listener can exercise more control over when and how to access a programme?
- What roles should a state regulator play, aside from determining complaints and approving codes of practice?
- What of the statutory concepts themselves – such as good taste and decency, or balance – on which broadcasting standards are built? In a period of greater individual control and choice, are these concepts the ones we still want to be at the heart of broadcast content regulation?
- Should these concepts, or others, be applied more widely?
- And does greater individual control over how content is received mean that there should be greater individual responsibility?

Your response to this paper will help the government to develop future options for New Zealand's content regulation in broadcasting and related media. Further consultation will be held should any changes to the regime be proposed.

Reviewing New Zealand's regime for content regulation is an aspect of the government's broadcasting Programme of Action. The full

Programme can be viewed at www.mch.govt.nz/publications/public-broadcasting/public-bdcast.html.

Decisions under the current broadcasting standards regime are made in accordance with the New Zealand Bill of Rights Act 1990, which affirms, among other rights, the right to freedom of expression. Any discussion of changes to the scope or nature of content regulation needs to be conducted with the Bill of Rights in mind.

Please go to the Questionnaire

Questions

Please read the* Introduction *before answering the following questions.

Questions of scope

In New Zealand it is possible to make complaints about broadcast content – to broadcasters and then, if unsatisfied, to a regulatory agency. The first set of questions asks about the scope of content regulation: what regulation should be concerned with, and whether it should extend beyond conventional broadcasting. It also asks whether different levels of regulation should apply to content delivered in different ways – for example content that we choose to receive at our demand, compared with content broadcast generally.

What the regulation of content should be concerned with

In regulating broadcast content, certain concerns are common internationally. These include the protection of minors, the portrayal of violence, accuracy in reporting, the protection of privacy, and the fair treatment of people who are the subjects of programmes.

Q 1:
What concerns are appropriate to be addressed through content regulation?

A single regime?

At present the content regulation regime in New Zealand established under the Broadcasting Act 1989 only applies to conventional, scheduled television and radio broadcasts. But internationally, broadcasters are increasingly using digital technology to make their content available in other ways (such as over the internet or on mobile devices), at the demand of individual viewers and listeners. Some content providers are only operating on these newer platforms (for example, radio stations that only podcast, TV stations that operate only over the internet, telecommunications companies that provide content only on mobile devices).

Q 2:
Should a single regulatory regime apply to all broadcasting-like content no matter how it is distributed?

Yes / No

Please give reasons for your answer.

Q 3:
Should the same general regime apply, but with a less strict or detailed code for content received on the demand of individuals than for content broadcast conventionally?

Yes / No

Please give reasons for your answer

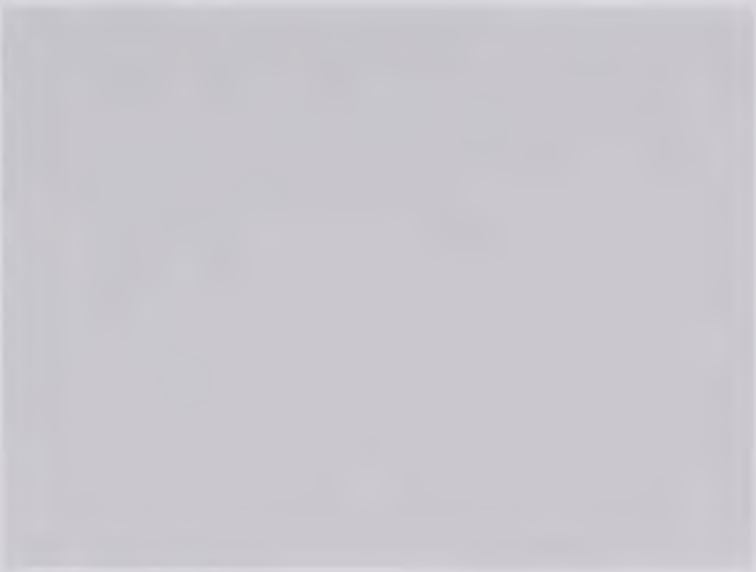
Q 4:

Publicly-owned broadcasters have special mandates to set standards of quality (such as the Charters of TVNZ and Radio New Zealand or the legislation of Maori Television).

Should their content be regulated differently from the content of private-sector broadcasters or the same?

Differently / The same

Please give reasons for your answer.



Broadcasting-like material provided from outside New Zealand

While an increasing variety of broadcasting-like content is being made available through various media from New Zealand sources, much else is available to New Zealanders directly from overseas sources, especially via the internet. Of this content, some would not meet New Zealand's broadcast standards if it was broadcast from here. Some may violate other laws, such as the Crimes Act or the Film, Videos and Publications Classification Act (for example, material which encouraged the commission of crimes or incited racial hatred).

It is difficult to regulate such overseas-sourced content. Some measures that have been used in other countries include: instructing local internet service providers not to provide access to certain content; or requesting regulatory authorities in other countries to take action to prevent certain content being provided in the country of

origin. Other regulatory approaches overseas have included the subsidised provision of internet filtering software to the public, and an increased emphasis on media literacy, so that people are better enabled to identify and avoid undesired content.

If overseas-sourced content were not regulated at all, it could be argued that New Zealand broadcasters and other providers of content would be disadvantaged. Alternatively, however, there may be an advantage to a local provider's reputation in being seen to uphold standards which other sources cannot be relied on to follow.

Q 5:
Should broadcasting-like content provided to audiences from overseas be subject to New Zealand's regime for content regulation?

Yes / No

Please give reasons for your answer.

Q 6:
If you answered yes, what form should regulation take, and who should regulate such content?

The role of a regulator

New Zealand's regulatory regime is mainly reactive – that is, it is mainly concerned with assessing complaints. This next group of questions is about the role an agency involved in regulation might play. It asks how far an agency should be involved in activities other than ruling on complaints – such as monitoring the broadcasting environment or promoting media literacy. But it starts by asking whether there should be a regulatory agency at all.

A regulatory agency vs. self-regulation

Like several countries, New Zealand has a state agency, independent of government, to determine complaints, when complainants are dissatisfied with a broadcaster's response, and to approve the codes of practice that must be followed by broadcasters. Broadcasters are involved in devising the codes and receive complaints in the first instance. An alternative to this system is for broadcasters to regulate themselves, though still in accordance with legislation. (Self-regulation is already practised in the case of advertising.)

Q 7:
a) Should there continue to be a state agency available in New Zealand to operate a system of content regulation?

Yes / No

Or
b) Should broadcasters be able to regulate themselves, within the requirements of legislation?

Yes / No

Please give reasons for your answer.

A broader role for an agency?

The government receives advice on broadcasting policy and on trends in broadcasting from its officials. Government departments monitor the performance, against their statutory objectives, of the public broadcasters. There is no body *independent* of government in New Zealand charged with the oversight of public broadcasting, or with monitoring whether public broadcasting objectives are being met. New Zealand also does not have the media ownership laws that, in other countries, are used as a means of encouraging diversity or quality in broadcast content.

Q 8:
a) Are the current arrangements for monitoring public broadcasting and the broadcasting environment adequate?

Yes / No

Please give reasons for your answer

b) Are there any gaps in the current arrangements?

Yes / No

Please give reasons for your answer.

An idea raised in the government's broadcasting Programme of Action is for an independent agency to play a "watchdog" role in relation to broadcasting in ways that go beyond content standards. Such an agency could, for example, comment on the state of the broadcasting and wider media environment, conduct research more widely, and make reports to government.

Q 9 :
If you believe that there are gaps in the current arrangements, would such an agency play a useful role?

Yes / No

Please give reasons for your answer.

If you answered "no", what other ways of monitoring the broadcasting environment could be explored?

Media literacy and education

The current content regulatory regime in New Zealand is essentially protective, although the Broadcasting Standards Authority is also involved in projects to promote media literacy initiatives and education. Some take the view that the way to respond to the greater variety of ways of transmitting content is to place more responsibility in the hands of individuals to make informed choices about what they watch and listen to. Promoting media literacy – an awareness of how broadcasting and other media work and the effects they can have on audiences – can be a way of helping people to make such choices.

Q 10:
Do you favour a stronger role for a state agency in encouraging media literacy?

Yes / No

Please give reasons for your answer

Q 11:
Would a greater emphasis on media literacy be useful to New Zealand audiences in order to identify and avoid undesired content sourced directly from overseas?

Yes / No

Please give reasons for your answer

Are there any other measures that should be considered?

Media education and violence

The 2004 Working Group report on TV Violence recommended that the Broadcasting Standards Authority's role be widened to mandate it to undertake an educative and collaborative role with relation to violence on television.

Q 12:
Should these roles be part of the mandate of New Zealand's broadcast content regulator?

Yes / No

Please give reasons for your answer

Q 13:
Should it have a similar educative and collaborative role in relation to other matters, such as, for example, the interests of children and young people?

Yes / No

Please give reasons for your answer

The concepts guiding broadcast standards

Any system of content regulation, whether operated by an agency or through self-regulation, needs to be based on some principles or concepts, to determine *what* is regulated and for what reason. The Introduction to this paper quotes the concepts that the Broadcasting Act requires broadcasters to take into account in maintaining standards: "the observance of good taste and decency"; "the maintenance of law and order"; "the privacy of the individual" - and the principle of balance, by which differing points of view on controversial issues should be aired within the same programme or "within the period of current interest". The following set of questions seeks your views on these concepts – or alternatives to them.

A single set of concepts?

As noted in the Introduction, broadcasting-like material is appearing in different media, under different regulatory regimes. The first question to answer, then, is whether we want a single set of regulatory concepts to apply, and how *far* it should apply.

Q 14:
Are a single set of broad concepts as a basis for content regulation more, or less, important in an era of increased choice in content and in the ways of receiving it?

Please give reasons for your answer.

Q 15:
a) Should the concepts currently guiding the standards applying to broadcasting continue to apply to broadcasting?

Yes / No

b) If yes, should they apply more widely across the scope of content regulation, - that is, beyond conventional broadcasting?

Yes / No

Please give reasons for your answers.

c) Are there different concepts that should be added or substituted for those in the Act, and applied either to broadcasting or to a wider range of content?

Particular concepts

The concepts in the Act include "good taste and decency", meaning what people currently think is decent or indecent, or in good taste. An alternative concept might be that of actual social harm, where the concern would be with the likely effect of content on the audience or society at large. (Such a concept, of content that is "injurious to the public good", is a guiding idea in the Films, Videos and Publications Classification Act.)

Q 16:
Do you have a preference between these two possible approaches?

Yes / No

Please give reasons for your answer.

The current Act includes a principle of balance: "the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest" (Section 4(1) (d).

Q 17:
Does this principle, as currently expressed in the Act, remain important in an era of an increasing variety of outlets for information?

Yes / No

Please give reasons for your answer.

Q 18:
If the principle of balance remains important in conventional broadcasting, should it apply more widely if the scope of regulation is widened beyond conventional broadcasting?

Yes / No

Please give reasons for your answer.

Q 19:
To what extent is the achievement of accuracy dependent on the availability of a balance of views

a) within a broadcast programme, or other audio-visual content?

b) across broadcast programmes, or other content, by the same provider of content?

c) across the media as a whole?

Other ideas and comments

Q 20:
Do you have comments on aspects of content regulation that are not covered by the questions above? If so please include them here.

Functions of the Broadcasting Standards Authority

Broadcasting Act 1989, section 21

(1) The functions of the Authority shall be—

(a) To receive and determine complaints from persons who are dissatisfied with the outcome of complaints made to broadcasters under section 6(1)(a) of this Act; and

(b) To receive and determine complaints from persons where the complaint constitutes an allegation that a broadcaster has failed to comply with section 4(1)(c) of this Act, and the complainant has elected to refer the complaint to the Authority in the first instance; and

(c) To publicise its procedures in relation to complaints; and

(d) To issue to any or all broadcasters, advisory opinions relating to broadcasting standards and ethical conduct in broadcasting; and

(e) To encourage the development and observance by broadcasters of codes of broadcasting practice appropriate to the type of broadcasting undertaken by such broadcasters, in relation to—

(i) The protection of children.
(ii) The portrayal of violence.
(iii) Fair and accurate programmes and procedures for correcting factual errors and redressing unfairness.
(iv) Safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the

community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs.

(v) Restrictions on the promotion of liquor.

(vi) Presentation of appropriate warnings in respect of programmes, including programmes that have been classified as suitable only for particular audiences.

(vii) The privacy of the individual.

(f) To develop and issue codes of broadcasting practice of the kinds described in paragraph (e) of this subsection in any case where the Authority considers it appropriate.

(g) To approve, for the purposes of this Act, codes of practice of the kinds described in paragraph (e) of this subsection.

(h) To conduct research and publish findings on matters relating to standards in broadcasting.

(2) The Authority shall, in encouraging, under subsection (1)(e) of this section, the development by broadcasters of codes of broadcasting practice, encourage broadcasters to consult with persons having an interest in the subject-matter of those codes.

(3) Nothing in subsection (1) of this section shall relate to advertising programmes or any credit in respect of a sponsorship or underwriting arrangement entered into in relation to a programme except where neither the broadcaster nor the advertiser recognise, in relation to a specific complaint, the jurisdiction of the Advertising Standards Complaints Board (a board appointed by the Advertising Standards Authority Incorporated).

(4) When performing its functions under subsection (1)(e), (f), or (g) in relation to a code of practice of the kind described in

subsection (1)(e)(vii), the Authority must consult with the Privacy Commissioner appointed under the Privacy Act 1993.

(5) Except as expressly provided otherwise in this or any other Act, the Authority must act independently in performing its statutory functions and duties, and exercising its statutory powers, under—

(a) this Act; and

(b) any other Act that expressly provides for the functions, powers, or duties of the Authority (other than the Crown Entities Act 2004).